IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 1477 OF 2005

Jintendra Shantilal Shah ...Applicant.

V/s

Pankaj Nalinkant Sheth
and Anr. ...Respondents.

Mr. A.H.H. Ponda i/b M/s Mehta and Girdharlal for the applicant.
Mr. Ganesh Gole with Arpan Rajput for respondent No.1.
Mr. S.R. Shinde, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 29th March, 2005

P.C.:

1. Heard the learned Counsel for the applicant.

2. Applicant is challenging the order passed by the Metropolitan Magistrate, 33rd Court, Ballard Pier by which the Magistrate rejected the application of the applicant for discharge and refused to recall the process issued against the applicant - accused.

3. It is submitted by the learned counsel appearing on behalf of the applicant that there are no averments made by the complainant in the complaint and also in the Examination-in-chief which has been recorded in the affidavit that the applicant was in charge of or responsible for the conduct of the business of the

firm. It is submitted that the complaint which was filed under section 138 was, therefore, lacking material allegations and, therefore, the complaint was liable to be dismissed qua the applicant. The learned Counsel for the applicant has relied upon the judgment of the Supreme Court in the case of Sham Sundar and others vs. State of Haryana reported in AIR 1989 SC 1982.

4. I am unable to accept the submissions made by the learned counsel for the applicant. In the complaint, in para 2, there is a specific averment that the complainant knows the applicant - accused No.2 and that he is a partner of accused No.1. It is further stated that accused Nos. 1 and 2 are having partnership business and that they are also dealing in Wall-clocks. Thereafter, in paragraph Nos. 3 and 4, details regarding transactions have been stated. In paragraph 5, further particulars regarding loan which was given by the applicant to accused No.2 have been stated. In paragraph 5 it is stated that the applicant - accused No.2 has signed the receipts and issued various cheques towards the repayment of the loan amount, details of which are mentioned in paragraph 5. Thus, it cannot be said that there are no averments in the complaint stating that the

applicant is in-charge of and in control of the firm. The reliance is placed by the learned counsel for the applicant on the Judgment of the Supreme Court in the case of Sham Sundar (supra). In my view, the ratio of the said judgment would not be applicable to the facts and circumstances of the present case. In the said case, the Supreme Court had an occasion to consider the judgment and order of conviction and sentence which was confirmed by the High Court of Punjab and Haryana. The observations made by the Supreme Court in that judgment were obviously after the evidence was adduced by both the parties. In the present case, the application is preferred under section 482 of the Criminal Procedure Code and it will not be possible to decide these disputed questions at this stage. The Criminal Application is, therefore, dismissed. All questions raised in this application are kept open. Trial Court shall decide all questions raised in this application after the evidence is adduced by both the parties.

5. Accordingly, Criminal Application is dismissed.

V.M. KANADE, J.